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No. 85-725

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

WOODROW MAUGET

Petitioner,

vs.

KAISER ENGINEERS, INC.
PIPE FITTERS UNION LOCAL NO. 392

Respondents.

MEMORANDUM OF RESPONDENT PIPEFITTERS UNION LOCAL NO. 392 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) be prospective only or be retroactively applied?

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COUNTERSTATEMENT OF THE CASE

This case was brought under Section 301 of the NLRA, 29 U.S.C. §185 by an employee (Mauget) who was terminated from

his employment at the Zimmer Nuclear Power Station on December 7, 1976. Mauget had been referred to such employment through the hiring hall maintained by Pipefitter's Union Local No. 392. The employer, Kaiser Engineers, Inc., had a rigidly enforced rule that provided for termination of any employee who was absent for over three days without giving notice to the employer. Mauget was terminated from his employment for being absent for over three days without giving the requisite notice. Mauget claimed that he did in fact call in sick. There was not, however, any record of his call in the telephone logs maintained by the Employer. Mauget claimed that the Union interfered with his reinstatement on December 7, 1976, refused to process his

"grievance" and refused to refer him to other employment in January and February of 1977. The Union, of course, denied these allegations.

Mauget presented his claims to Region 9 of the National Labor Relations Board and unfair labor practice charges were filed in June, 1977 against both Local No. 392 and Mauget's own Union, Plumber's Local 59. After a thorough investigation, the regional director of the NLRB dismissed the claims as groundless on August 19, 1977. This dismissal was appealed by Mauget's present counsel but was nevertheless affirmed on October 26, 1977.

Over a year later, on December 7, 1978, Mauget filed his Section 301 suit against the Employer only. He later

filed an amended complaint joining Local No. 392 on March 8, 1979, two years and three months after his discharge.

Following the Supreme Court's decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the Employer and the Union moved for summary judgment on the basis of Mitchell. The issue of retroactivity was extensively briefed by the parties. Each party briefed and argued the case under the retroactivity standards contained in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The district court judge performed a lengthy Chevron analysis and rendered his decision on September 9, 1982. The court applied Mitchell retroactively and dismissed Mauget's claims against both the Employer and the Union which related to his

discharge by the Employer and the Union's representation of him in connection with the discharge. The district court, however, read Mauget's amended complaint as containing within it a subsidiary claim that the Union had treated him unfairly in refusing him referrals after his discharge from his employer. These refusals allegedly took place between the December 7, 1976 discharge and the end of February, 1977. The district judge held that this claim was not governed by the Mitchell statute but by the Ohio six year statute for liabilities arising under statute, O.R.C. §2305.07. This claim was not, therefore, dismissed.

Following the Supreme Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151

(1983), the Union moved for dismissal of the claim remaining against it. The retroactivity issue and the Chevron factors were again briefed and argued. On August 2, 1983, the district court applied DelCostello retroactively and granted the Union's motion to dismiss. The district judge concluded that DelCostello could be applied retroactively "under the Chevron analysis concerning retroactivity." The judge further concluded that DelCostello established no new principles of law nor overruled past precedent. The judge found that it was not "unjust" to apply DelCostello retroactively in this case.

Mauget appealed to the Sixth Circuit from both the September 9, 1981 decision and the August 2, 1983 decision. The

issue in the Court of Appeals was whether the district court committed error in applying Mitchell and DelCostello retroactively. The parties again briefed the retroactivity issue under the Chevron standard. While the case was awaiting oral argument, the Sixth Circuit decided Smith v. General Motors Corp., 747 F. 2d 372 (6th Cir., 1984) (en banc). Following its decision in Smith, the Sixth Circuit applied DelCostello retroactively and affirmed the decisions of the district court.

ARGUMENT

The question presented in this case has neither novelty nor special importance to recommend it. In the previous

petitions presenting this question to the Court, certiorari has been denied. Greyhound Lines, Inc. v. Melody Wilhite, ___ U.S. _____, No. 84-2016, slip opinion, October 15, 1985; Raymond L. Saville, Jr. v. Westinghouse Electric Corp. and United Electrical Radio and Machine Worker's of America, Local 107, ___ U.S. _____, No. 84-2034, slip opinion, October 15, 1985; Glover v. United Grocers, Inc., 746 F. 2d 1380 (9th Cir., 1984), cert. denied, ____ U.S. _____, 105 S.Ct. 2357 (1985); Welyczko v. U.S. Air, Inc., 733 F. 2d 239 (2d. Cir., 1984), cert. denied, ____ U.S. _____, 105 S.Ct. 512 (1984); Rogers v. Lockheed-Georgia Co., 720 F. 2d 1247, (11th Cir., 1983), cert. denied, ____ U.S. _____, 105 S.Ct. 292 (1984); Murray v. Branch Motor Express

Co., 723 F. 2d 1146 (4th Cir., 1983), cert. denied, ____ U.S _____, 105 S.Ct. 292 (1984); Ernst v. Indiana Bell Telephone Co., 717 F. 2d 1036 (7th Cir., 1983) cert. denied, ____ U.S. _____, 104 S.Ct. 707 (1984); Edwards v. Teamsters Local No. 36, 719 F. 2d 1036 (9th Cir., 1983), cert. denied, ____ U.S. _____, 104 S.Ct. 1599 (1984).

For the reasons set forth below, certiorari should be denied in this case as well.

I. THE COURT BELOW WAS CORRECT IN AFFIRMING DISMISSAL OF THIS CASE WITHOUT ENGAGING IN AN INDEPENDENT CHEVRON ANALYSIS.

The Sixth Circuit's decision in this case was based on its previous en banc

decision in Smith v. General Motors Corp., supra. The court held, in Smith, that the six month statute of limitations for hybrid Section 301/unfair representations claims was applicable to all cases pending at the time DelCostello was decided. The court followed the reasoning of the Second Circuit expressed in Welyczko v. U.S. Air, Inc., supra, that the Supreme Court implicitly held that the six month statute should be applied retroactively since the court in fact applied it retroactively in DelCostello to bar the claim of one of the employee-litigants. Relying on this rationale, the court concluded that there was no need for ad hoc Chevron analysis of each pending case.

There was no need for the Sixth

Circuit to perform a Chevron review in Smith or in this case because the application of the Chevron test in any of these cases leads inevitably to the conclusion that DelCostello applies retroactively. Retroactive application is the rule rather than the exception. A court is to apply the law in effect at the time of decision unless doing so would result in manifest injustice. Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The test for determining whether a decision will have only prospective application has three parts. Chevron Oil Co. v. Huson, supra, at 106-107. In Chevron, the court stated:

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must

> establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly forshadowed ... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, ... where a decision of this Court could produce substantial inquitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity." Chevron Oil Co. v. Huson, supra, at 106, 107.

While the Supreme Court has not yet stated specifically that all three tests must be satisfied to avoid retroactivity, the Court did, in Chevron itself, identify the factors as "three separate factors." Chevron, supra, at 106. Several circuit courts have found the factors to

be distinct and discrete See, Rogers v. Lockheed-Georgia Co., supra, (11th Cir., 1983) and Holzsager v. Valley Hospital, 646 F. 2d 792, 797 (2d. Cir., 1981).

The first and third prongs of the Chevron test address equitable considerations and are therefore logically related. The second prong, however, addresses a concern which does not depend on the varying facts of individual cases. The second prong involves the determination of the purpose and effect of the rule in question. In Chevron, the Court found that non-retroactivity was warranted because both the equity test of the first and third prongs and the purpose/ policy test of the second prong were met. Chevron, supra, 404 U.S. at 109.

In DelCostello the Court discussed

and decided once and for all the purpose and policy reasons for applying the Section 10(b) limitation. The Court adopted the observations made by Justice Stewart in Mitchell:

> In Section 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the "final and binding determination" of a grievance through the method established by the collective bargaining agreement unquestionably implicates "those consentual processes that federal labor law is chiefly designed to promote - the formation of the ... agreement and the private settlement of disputes under it." Hoosier, 383 U.S., at 702, 86 S.Ct. at 1111. Accordingly, "the need for uniformity" among procedures followed for similar claims ibid., as well as the clear congressional indication of the proper balance between the interests at stake,

> counsels the adoption of Section 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." DelCostello, supra, 103 S.Ct. at 2294.

Since the purpose of adopting the Section 10(b) limitation period was to promote uniformity and finality, it would retard (not further) the purpose of the rule to apply it only prospectively. Non-retroactive application would permit the continuance of the chaotic lack of uniformity which existed from state to state and from circuit to circuit. The respondent Union contends that the Court decided as a matter of law in DelCostello that the second prong of the Chevron test could not be met in DelCostello or in any of the other similar cases pending at the time and, therefore, it was logical for the Court to apply the Section 10(b)

limitation period retroactively in the DelCostello case itself.

II. THIS CASE PRESENTS NO IMPORTANT FEDERAL QUESTION WARRANTING REVIEW ON CERTIORARI.

The question presented by the Petitioner is whether the decision made by the Court in DelCostello applies retroactively. As discussed above, the question was answered in the DelCostello case itself. DelCostello provided the uniformity and finality which had been sorely needed. The Petitioner here asks the Court to retreat from the DelCostello decision and make the chaos last a little longer. If the Petitioner prevails and certiorari is granted, the stability of judicial decision will be undermined.

If certiorari is granted to review the question presented here, each side would undoubtedly brief and argue the Chevron test. Ultimately, the Court would have to decide whether the second prong of the Chevron test was satisfied. If the Court were to find that the second prong was satisfied, then the purpose/policy analysis of DelCostello would be meaningless or, at least, severely weakened. If the Court were to hold that the second prong was not satisfied, consistent with the purpose/policy analysis of DelCostello, the Court would be merely wasting its time and resources by needlessly reiterating what was already said in DelCostello.

The Supreme Court frequently decides cases which have great impact without, as

a general rule, specifying whether the decision will be retroactive or prospective only. See, for example, Garcia v. San Antonio Metro Transit Authority, _____, U.S. _____, 105 S.Ct. 1005, (1985). The Court should not now, on this question, begin second-guessing itself. To do so would create the expectation that a retroactive/prospective determination is or should be part and parcel of every major Supreme Court decision. By granting certiorari in this case, the Court would in effect be apologizing for not specifically stating in DelCostello whether the decision was retroactive or prospective only. In every major future case, counsel and courts alike would be uncertain of the Supreme Court's intention when the Supreme Court makes a major

decision without discussing retroactivity. If certiorari is granted here, this case will be perpetually cited, regardless of the ultimate outcome, for the rule that the retroactivity or prospectivity of a decision (DelCostello here) is open to question and further review unless the issue is specifically discussed in the decision itself. The Court should not permit the genesis of such a rule. Rather, the rule should remain, as it has been, that a decision made by the Supreme Court applies retroactively unless the Court, in the decision itself, expressly limits it to prospective application.

III. THE CONFLICT AMONG THE CIRCUITS DOES NOT COMPEL REVIEW ON CERTIORARI.

As noted at the outset, the question of the retroactivity of DelCostello has been presented before and in each instance certiorari has been denied. The Court has already seen this issue in all of the variations which exist among the circuits. The Ninth Circuit's position is that DelCostello applies prospectively unless retroactive application would extend the limitation. Certiorari was denied in the Ninth Circuit cases of Greyhound Lines, Inc. v. Melody Wilhite, supra; Raymond L. Saville, Jr. v. Westinghouse Electric Corp et al., supra; and Edwards v. Teamsters Local No. 36, supra.

The view that DelCostello applies retroactively because the second prong of the Chevron test is not satisfied was represented in Rogers, supra, (11th Cir.) and Murray, supra, (4th Cir.). Certiorari was denied in these cases.

The third view, that no Chevron analysis needs to be done since the Supreme Court has already answered the question by applying the rule retroactively in DelCostello itself, was represented in Welyczko, supra, (2d. Cir.). This view is also represented in this case from the Sixth Circuit. Certiorari was denied in Welyczko, and this case presents the same viewpoint.

At this time, all circuits except the Ninth have held that DelCostello applies retroactively. See, Zemonick v. Consoli-

dation Coal Co., 762 F. 2d 381, 397 (dissent) (4th Cir., 1985) and Smith v. General Motors Corp., 747 F. 2d 372, 374-375 (6th Cir., 1984). While retroactivity is the general rule in the Fourth Circuit, Murray, supra, the Fourth Circuit recently favored prospective application in Zemonick v. Consolidation Coal Co., 762 F. 2d 381 (4th Cir., 1985). In this case, the court, over a strong and well-reasoned dissent, found that the peculiar circumstances of the case justified a limited exception to the general Fourth Circuit rule of retroactivity.

While the Ninth Circuit still takes a position different from that which prevails in the other circuits, the difference does not amount to a serious conflict which will fester and produce a

state of enduring havoc. As stated by the majority in Zemonick, "This problem will shortly go away, if it is not already gone." Zemonick, supra, at 389.

CONCLUSION

The question presented in this case is not new. It has been presented to the Court from all angles and from several different circuits. The question has already been answered by the Court itself by virtue of the retroactive application made by the Court in DelCostello. The question is also answered under the Chevron test, since the second prong of the test cannot be satisfied unless the finality and uniformity goals of federal labor law are abandoned. Except for the Ninth Circuit, the Courts of Appeal are essen-

tially unified. The question presented in this case is now on its deathbed and will soon die on its own. It should not be kept alive by the extraordinary means of certiorari.

Respectfully
submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Memorandum were served by first class United States mail, postage prepaid, upon Paul H. Tobias, Attorney for Petitioner, 911 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202 and upon Robert E. Kaplan, Attorney for Kaiser Engineers, Inc., Dinsmore & Shohl, 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202 on the ____ day of November, 1985.

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